In the Supreme Court of the United States

OCTOBER TERM, 1941.

THE CITY OF INDIANAPOLIS, *et al.*,
Petitioners,
v.
THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, TRUSTEE, etc., *et al.*,
Respondents.
Nos. 10 and 11.

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Cross-Petitioner,
v.
CITIZENS GAS COMPANY OF INDIANAPOLIS, *et al.*,
Respondents.
Nos. 12 and 13.

PETITION OF THE CHASE NATIONAL BANK, TRUSTEE, FOR REHEARING.

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Authorities Cited or Distinguished.

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT:

Now comes the above named The Chase National Bank of the City of New York, Trustee, respondent in causes 10 and 11 and cross-petitioner in causes 12 and 13, and presents this, its Petition for Rehearing in each of the above entitled causes, and in support thereof respectfully shows:

SUMMARY OF GROUNDS OF PETITION.

FIRST: The opinion of the Court is based upon mistakes of fact as to the record and the issues presented in the trial court, and therefore overlooks the many "collisions of interest" between plaintiff and Indianapolis Gas which make a realignment wholly improper.

SECOND: The opinion of the Court is based on a manifest misapprehension of the law as laid down in the decisions of this Court and consistently followed by the lower federal courts, in that in no prior case has any federal court either

(a) required a defendant, against whom a money judgment was either sought or obtained, to be realigned with plaintiff for jurisdictional purposes, or

(b) tried to determine the most important controversy in a case involving several parties and a number of issues, and realigned the parties in accordance with their attitude toward that one controversy, without regard to their position as to the remaining controversies in the case.

THIRD: This petitioner has not had an adequate opportunity to present its position as to the authorities relied upon by the Court, almost all of which had never been cited in the briefs of any of the parties and *all* of which are clearly distinguishable from the case at bar.

FOURTH: The rule laid down by the Court—that in a case involving several parties and multiple issues an attempt must be made to determine the "primary and controlling matter" in dispute and that the various parties must be realigned in accordance with their attitude toward that single issue, without regard to their position as to the other issues in the case—is wholly impracticable and impossible of application.

GROUNDS URGED IN SUPPORT OF PETITION WITH SUPPORTING REASONS.

First: The opinion of the Court is based upon mistakes of fact as to the record and the issues presented in the trial court, and therefore overlooks the many collisions of interest between plaintiff and Indianapolis Gas which make a re-alignment wholly improper.

The Court's conclusion (Opinion, pp. 4-5) that everything in this case is merely "incidental" to the so-called "dominating controversy" between plaintiff and the City as to the validity of the Lease is based on mistakes as to the facts shown in the record and the issues presented in the lower courts. The "realities of the record" are clear. Chase, a citizen of New York, representing the bondholders for whom it was trustee, sought judgments against each of the three defendants, citizens of Indiana, aimed at:

(1) Collecting the overdue interest from each of them.

(2) Protecting the security against encroachments and other threatened encroachments by all three of the defendants.

As to each of these objects *specific relief was sought against each of the defendants*, and particularly against Indianapolis Gas and the City. Since the majority opinion refers to these objects as "window dressing designed to satisfy the requirements of diversity jurisdiction," they deserve more than passing consideration.

1. Plaintiff sought an order, pending final judgment, restraining Indianapolis Gas from interfering with the Lease in any way (Prayer 4, I R. 21). This prayer was supported by the allegations of paragraph 23 of the Bill. During the oral argument the City's counsel stated that the evidence showed these allegations to be "absolutely untrue." The facts are exactly the contrary. Let us detail some:

July 23, 1935 (III R. 836). City offered "to enter into negotiations with" Indianapolis Gas "looking toward a revision of this lease."

September 27, 1935 (III R. 967). City refers to its "repeated requests for an opportunity to negotiate a lease" and inquires whether Indianapolis Gas is "willing to undertake to negotiate such an agreement."

September 30, 1935 (III R. 838). Indianapolis Gas says that it "will, of course, be glad to take part in such a discussion."

September 30, 1935 (III R. 839). City requests Indianapolis Gas to fix time for conference.

February 8, 1936 (III R. 839). Indianapolis Gas requests City to submit specific "prices, terms and conditions."

February 10, 1936 (III R. 840-2). City offers $7,500,000 to Indianapolis Gas with interest from March 9, 1936, for Indianapolis Gas property.

In the face of such evidence it can hardly be denied that the City and Indianapolis Gas were carrying on negotiations looking "toward a cancellation of said lease and the destruction and waste" of plaintiff's security.

2. Plaintiff prayed that the Lease be declared "a valid and binding obligation in all its terms and conditions" as against Indianapolis Gas as well as Citizens Gas and the City (Prayer 2, I R. 20-21). What has just been said reveals the necessity of this relief against *all* the defendants. The rights of plaintiff and Indianapolis Gas under the Lease are separate and distinct and any new arrangement between Indianapolis Gas and the City might have sacrificed rights enjoyed by the Bondholders in order to protect the interests of the stockholders.

3. Plaintiff sought a declaration that the contract of March 2, 1936, had no effect on the rights of the bondholders under the Lease (I R. 259, Par. (4)).

The Lease required the lessee to pay the bond interest *to the bondholders* (I R. 69, Par. 21; I R. 72, Par. 22) but this contract made *all* the rent payable to Indianapolis Gas (I R. 206, Par. (b)), thus subjecting these payments, in

the hands of Indianapolis Gas, to being seized by other creditors of that company. There was no doubt in the City's mind that this contract of March 2, 1936, was disadvantageous to the Trustee and the Bondholders. Indeed, the City sought by its counter-claim to have a declaration that the agreement of March 2, 1936, was "binding according to its terms upon plaintiff" and that the resulting use of the property was binding "upon plaintiff and the bondholders represented by it" (I R. 187).

There was grave danger that performance under this agreement of March 2, 1936, would, if it were binding upon plaintiff, be a full performance of the City's obligations under the Lease. This might well have deprived the bondholders of their right to secure interest on overdue coupons, an item which now amounts to almost a quarter of a million dollars.

The Court's opinion purports to answer this argument by stating (p. 5, note 3) that the Lease contained "no provisions requiring payment of the interest direct to Chase or the bondholders." The Court of Appeals held exactly to the contrary and no party assigned any error to such holding.

As a matter of fact, the Lease provided specifically that the lessee would perform all the obligations of the mortgagor except that as to the payment of the principal of the Bonds (Lease, Par. 22, I R. 72). The mortgage contained a covenant whereby Indianapolis Gas expressly agreed "to and with" the Trustee that it would provide for and pay the principal and interest on the Bonds (I R. 44) and further provided that the Trustee could compel specific performance of all covenants of the mortgage (I R. 46). Citizens Gas admitted that while it held the mortgaged property it had paid the interest "by making payment directly to the Trustee of said bonds or to the bondholders themselves" (I R. 257, 270). The Circuit Court of Appeals specifically held that the Trustee had the right to recover the interest from Indianapolis Gas (IV R. 1362-3)

and the rent from Citizens Gas and the City (IV R. 1306). No party assigned error to this determination and yet, in deciding the jurisdictional question, this Court assumed a state of facts directly opposite to that adjudicated by the Court of Appeals.

4. Plaintiff sought a decree ordering the City to pay to *plaintiff* all the interest payments becoming due thereafter (Prayer 7, I R. 21). Since this relief directly contravened the agreement of March 2, 1936, between Indianapolis Gas and the City, by which those two defendants sought to deprive plaintiff and the Bondholders of rights secured under the Lease, Indianapolis Gas was obviously a necessary *defendant* in the securing of such relief.

5. Plaintiff sought a judgment against *all* the defendants for the unpaid interest, with interest on the unpaid interest, and for plaintiff's expenses and attorneys' fees (Prayer 8, I R. 21; Prayer 10, II R. 301). Indianapolis Gas vigorously contested plaintiff's right to any personal judgment against it and successfully contended, in the District Court, that plaintiff was not entitled to recover interest on the unpaid coupons. Indianapolis Gas appealed from the judgment against it and urged in the Court of Appeals that plaintiff, as Trustee, was not the proper party to recover a personal judgment on the unpaid coupons, that plaintiff had no right to interest on interest, that the rate of interest was in any case not more than 5%, and that plaintiff could not have both a declaratory judgment and a coercive judgment. These questions were dealt with in detail by the Court of Appeals (IV R. 1301-6) and that court sustained the position of Indianapolis Gas as to the proper rate of interest on the judgment and on the overdue coupons.

The Court states that plaintiff did not bring this suit to obtain a *declaration* that Indianapolis Gas is responsible for the interest payments (p. 5, note 3). This is true but wholly immaterial. Plaintiff did sue to obtain

judgment against Indianapolis Gas for the unpaid interest, with interest on interest, and was successful against the vigorous opposition of Indianapolis Gas. This relief, *in no way dependent upon the validity of the Lease*, was obviously of importance in plaintiff's efforts *to obtain actual payment* of those items, particularly if the Lease were held invalid, since it would then be necessary for plaintiff to reach the assets of Indianapolis Gas, such as its rights against the City for use and occupation.

6. Plaintiff sought a judgment against each of the defendants for all losses caused by the failure to make or cause to be made the repairs and renewals necessary to maintain the mortgaged premises (Prayer 10, II R. 301). In so far as these failures occurred before September 9, 1935, *the liability of the defendants did not depend in any way upon the continuing validity of the Lease*. Indianapolis Gas was liable for such failure as mortgagor. Citizens Gas was liable by the terms of the Lease (I R. 64), which it admitted to be valid as long as it held possession. The City was liable for these defaults of Citizens Gas by reason of

(a) Accepting the property of Citizens Gas subject to all liabilities of Citizens Gas;

(b) Executing the Indemnity Agreement (II R. 306-7).

Here was a direct collision of interest in which all three of the defendants had precisely the same interest, namely, to claim that the property had been properly maintained. *The determination of this issue did not depend in any way upon the continuing validity of the Lease.*

7. Plaintiff sought an order compelling Indianapolis Gas to apply to the satisfaction of any judgments recovered against it all of its assets, including its right to recover from the City for the use of its property, whether under the Lease or otherwise (Prayer 12, II R. 302). *The right thus asserted did not depend in any way upon the validity of the Lease.* If the Lease was valid, plaintiff sought to reach as an asset of Indianapolis Gas the rental due under the Lease.

If the Lease was not valid, plaintiff sought to reach any amounts which were due to Indianapolis Gas for the City's use and occupation of the mortgaged property. In this branch of the case Indianapolis Gas was the primary debtor and the City merely a garnishee and the case is governed by *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368, cited in the majority opinion, in which case the court held that the primary debtor and the garnishee were properly aligned as defendants.

The right to join in one action a claim for money and a creditor's bill to reach the assets of the judgment debtor was specifically conferred by Rule 18(b) of the new Rules of Civil Procedure and this branch of plaintiff's case was strictly in accordance with the provisions of that rule.[1]

8. Plaintiff sought a declaration that any of the assets of Indianapolis Gas remaining after the satisfaction of the judgments against it were to be treated as part of the security for the Bonds and sought a sequestration of such assets (Prayer 12. II R. 303-4). It appeared specifically from the Bill that Indianapolis Gas owned $120,000 of the Mortgage Bonds and plaintiff sought to deny Indianapolis Gas the right to participate in any distribution of funds to the Bondholders until it had fully performed its obligations under the Mortgage, including those to repair and maintain the property (Prayer 12, II R. 304).

Clearly, these various objects of plaintiff's suit presented a number of very real and significant controversies between plaintiff and Indianapolis Gas which cannot be dismissed as mere "window dressing" or "illusive artifices." The Court's opinion indicates that the majority overlooked the importance of these objects and was led to do so by

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[1] The first sentence of Rule 18(b) reads:

"Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties."

the fact that the validity of the Lease was the only important question presented to the Supreme Court. This is shown by the Court's reliance (Opinion, p. 5) on plaintiff's statement in its rejoinder brief in this Court that "This case presents only one fundamental issue—whether the lease became part of the trust *res* in the hands of the corporate trustee" (p. 2). The importance attached to this statement is warranted only on the assumption that the Court was directing its consideration of the jurisdictional question to the issues presented in the Supreme Court and not to those presented in the lower courts. Undoubtedly the issue thus stated in plaintiff's rejoinder brief was the fundamental issue between plaintiff and the City *as the case was presented in the Supreme Court*, but plaintiff never admitted, and it is not the fact, that the case contained only that issue in either of the lower courts.

That the issue thus stated in plaintiff's rejoinder brief was the principal question presented to this Court resulted from the following wholly fortuitous circumstances:

(1) That Citizens Gas filed no petition for certiorari.

(2) That Indianapolis Gas filed no petition for certiorari.

(3) That the City did not raise by its petition for certiorari many questions ruled adversely to it by the Circuit Court of Appeals.

(4) That the District Court reserved for later determination certain issues which were not dependent in any way upon the continuing validity of the Lease.

Under these circumstances, it was only natural for the Court to overlook the many important issues between plaintiff and Indianapolis Gas which were presented to the District Court for determination or were reserved by that court for later determination. The fact that the Court did overlook these issues is, we submit, a persuasive ground for a rehearing.

Second: The opinion of the Court is based on a manifest misapprehension of the law as laid down in the decisions of this Court and consistently followed by the lower federal courts, in that in no prior case has any federal court either

(a) required a defendant, against whom a money judgment was either sought or obtained, to be realigned with plaintiff for jurisdictional purposes, or

(b) tried to determine the most important controversy in a case involving several parties and a number of issues, and realigned the parties in accordance with their attitude toward that one controversy, without regard to their position as to the remaining controversies in the case.

Entirely aside from the many other conflicts of interest between plaintiff and Indianapolis Gas outlined above (pp. 3-8), which are in themselves ample to sustain jurisdiction, this case presents a simple question:

When a mortgagee sues a mortgagor and a transferee of the mortgaged property, claiming that the transferee has assumed the mortgage, and seeking to collect the indebtedness from both the mortgagor and the transferee, does the fact that the mortgagor admits or even insists upon the primary liability of the transferee require the realignment of the mortgagor as a plaintiff?

To put the question in more general terms, when a creditor sues a principal and surety, seeking to collect the debt from both, and the surety takes the position that the principal is liable *as principal*, must the surety against whom a judgment is sought by the plaintiff be realigned for jurisdictional purposes?

Until the decision of the present case no federal court had ever required such realignment. On the contrary, every decision of any federal court which has ever dealt with the problem has held that the mortgagor or the surety

cannot be realigned, since the plaintiff is seeking a judgment against him.

Ayres v. Wiswall, 112 U. S. 187 (1884);
Coney v. Winchell, 116 U. S. 227 (1886);
Mutual Reserve Fund Life Association v. Farmer, 77 Fed. 929 (C. C. A. 8th, 1896).

In the first case cited the mortgagee and mortgagor were citizens of the same state and the transferee of the mortgaged property sought removal, urging that the mortgagor, Wiswall, should be realigned with plaintiff for jurisdictional purposes, since the mortgagor was supporting the plaintiff's contention that the transferee was liable. This is precisely the same contention as to realignment which is now being advanced by the City. The court denied that contention, saying in the *Ayres* case (112 U. S. 191):

"* * * In order that the complainants may get all the relief they ask, and which, upon their showing in the bill, they are entitled to, Wiswall is a necessary and substantial party to the suit, and on the opposite side from them."

In distinguishing the *Removal Cases*, 100 U. S. 457, and *Pacific Railroad v. Ketchum*, 101 U. S. 289, relied upon in the majority opinion, in both of which no relief was asked against the party sought to be realigned, Chief Justice Waite said (p. 192):

"* * * Here, however, relief is asked against Wiswall, and it grows directly out of the subject matter of the action, to wit, the collection of the mortgage debt which Wiswall owes jointly with the other debtors."

The decision in *Coney v. Wiswall*, *supra*, was to the same effect. It follows from these cases that a party must remain as a defendant if the plaintiff asks relief against him, otherwise the relief sought could not be granted. This proposition conclusively establishes that Indianapolis Gas should remain as a party defendant.

In no case cited by this Court or the City's counsel, and so far as we know in no case decided by any federal court, has it been held that a defendant against whom a money judgment was either sought or obtained could be realigned with plaintiff for jurisdictional purposes.

Beyond that, no case has been cited by the City's counsel or the Court involving several parties and multiple issues in which the court has attempted to determine the most important controversy presented and then has realigned the parties in accordance with their attitude toward that one controversy, without regard to their position as to the remaining controversies in the case. Whenever anyone has contended that federal jurisdiction should be determined in this way the courts have denied such contention and have refused to realign a defendant against whom relief was sought, even though that defendant favored the relief asked against another defendant.

Sutton v. English, 246 U. S. 199, 204 (1918);

Republic National Bank & Trust Co. v. Massachusetts Bonding and Insurance Co., 68 F. (2d) 445, 447 (C. C. A. 5th, 1934);

Detroit Tile & Mosaic Co. v. Mason Contractors' Association, 48 F. (2d) 729, 731 (C. C. A. 6th, 1931);

Franz v. Franz, 15 F. (2d) 797, 799 (C. C. A. 8th, 1926);

Feidler v. Bartleson, 161 Fed. 30, 35 (C. C. A. 9th, 1908);

Rex Co. v. International Harvester Co., 107 F. (2d) 767, 768 (C. C. A. 5th, 1939).

The same view was adopted in the Fourth Circuit in an opinion announced between the first and second arguments of the case at bar.

Mayor of Baltimore v. Crown Cork & Seal Co., 122 F. (2d) 385, 391-2 (C. C. A. 4th, August, 1941).

The cases cited in the majority opinion are either remote from the question at issue or clearly distinguishable. They may be roughly subdivided into four categories:

(1) Those in which the realignment was based on the fact that no relief was asked against the defendant realigned and the relief sought would have benefited that defendant.[2]

(2) Those in which the court refused to realign a merely nominal defendant which had no independent interest in the controversy.[3]

(3) Those involving suits by a minority shareholder in behalf of his corporation in which the corporation, controlled by those adverse to plaintiff, was held to be a proper defendant.[4]

(4) Those in which the court refused to realign as plaintiffs defendants against whom the plaintiff sought affirmative relief.[5] These cases support rather than deny jurisdiction in the case at bar, since they recognize the impossibility of realigning as a plaintiff a defendant against whom affirmative relief is sought.

The Court has cited a number of cases in which this Court or other federal courts have referred to the "actual controversy" or the "principal purpose of the suit" or the

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[2] *Niles-Bement-Pond Co. v. Iron Moulders Union*, 254 U. S. 77; *Dawson v. Columbia Trust Co.*, 197 U. S. 178; *Pacific R. R. Co. v. Ketchum*, 101 U. S. 289; *Steele v. Culver*, 211 U. S. 26; *Lee v. Lehigh Valley Coal Co.*, 267 U. S. 542; *Pittsburgh C. & St. L. Ry. Co. v. B. & O. R. R.*, 61 Fed. 705; *Cilley v. Patten*, 62 Fed. 498; *Board of Trustees v. Blair*, 70 Fed. 434; *Allen-West Commission Co. v. Brashear*, 176 Fed. 119; *Lindauer v. Compania Palomas, etc.*, 247 Fed. 428; *DeGraffenreid v. Yount-Lee Oil Co.*, 30 F. (2d) 574.

[3] *Helm v. Zarecor*, 222 U. S. 32; *Removal Cases*, 100 U. S. 457.

[4] *East Tennessee, etc. Railroad v. Grayson*, 119 U. S. 240; *Doctor v. Harrington*, 196 U. S. 579; *Venner v. Great Northern Ry. Co.*, 209 U. S. 24.

[5] *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368; *Sutton v. English*, 246 U. S. 199.

"primary and controlling matter in dispute." This language was not used to distinguish between the relativ importance of various controversies, and if there were several issues to be determined no single controversy was selected for the purpose of determining realignment. In most of the cases such language was merely used in connection with a general statement that the formal arrangement of the parties by the plaintiff is not controlling and that jurisdiction will be determined after "arranging parties according to the actual controversy." In some of the cases cited such language has been used in determining whether there was a separable controversy between plaintiff and one or more defendants so that there could be a removal in spite of the lack of complete diversity. In no case cited has any such expression been used to determine the relative importance of the issues presented against the various defendants and to deny federal jurisdiction on the basis of such determination.

There was no realignment of the parties in *Sutton v. English*, 246 U. S. 199, relied upon in the Court's opinion, so that at most the case involves only a *dictum by implication* that parties might be realigned according to their "attitude towards the actual and substantial controversy." As a matter of fact that case demonstrates the existence of federal jurisdiction of the case at bar. In that case the single controversy between plaintiff and defendant Cora Spencer was adequate to prevent her realignment despite her unity of interest with plaintiffs as to the remaining issues.

The majority opinion (p. 6, note 4) seeks to distinguish *Sutton v. English* on the ground that plaintiffs had to establish their rights as against Cora Spencer before they had any standing in the case. The fact is, however, that plaintiff in the case at bar is in precisely the same situation with respect to Indianapolis Gas. In order to recover the sums demanded, either from Indianapolis Gas, Citizens Gas, or the City, plaintiff had to establish:

(1) that it was the proper party to sue for a personal judgment on the unpaid coupons;

(2) that it was entitled to interest on the overdue coupons;

(3) that such interest should be at the rate of six rather than five per cent.

Each of these propositions was vigorously contested by Indianapolis Gas and it prevailed as to the third contention. Every contention that Indianapolis Gas advanced necessarily inured to the benefit of the City, since plaintiff's rights against the City could not be any greater than its rights against Indianapolis Gas. As to those contentions Indianapolis Gas and the City stood in precisely the same position, both of them adverse to the plaintiff. As to those issues plaintiff was under precisely the same necessity of establishing its case against Indianapolis Gas that the plaintiffs in *Sutton v. English* were under of establishing their case against Cora Spencer.

If we look through the form and regard the realities of the record, it is clear that plaintiff was attempting to recover the overdue interest from all of the defendants and to protect the security against the encroachments of all of them. Since relief of precisely the same character was sought against all the defendants, there is no justification for realigning Indianapolis Gas with the plaintiff.

The rule laid down by the Court—that in a case involving several parties and multiple issues an attempt must be made to determine the "primary and controlling matter" in dispute and that the various parties must be realigned in accordance with their attitude toward that single issue, without regard to their position as to the other issues in the case—is a wholly new rule which is based on a manifest misapprehension of the intention of Congress as heretofore consistently interpreted by the Courts.

Third: This petitioner has never had an adequate opportunity to present its position as to the authorities relied upon by the Court, almost all of which had never been cited in the briefs of any of the parties and all of which are clearly distinguishable from the case at bar.

Although the briefs of all the parties and the arguments before the Court have been taken up primarily with the merits of the controversy, we are now advised for the first time (Opinion, p. 4) that certiorari was granted more than a year ago "because of the important jurisdictional issue involved."

When this case was first before this Court on certiorari in October, 1938, we, in effect, requested this Court to grant the City's petition for certiorari if there were any doubt as to jurisdiction.[6] In spite of this request certiorari was denied and we assumed, apparently erroneously, that this Court agreed with us that there was no doubt as to federal jurisdiction.

When this case was first argued to this Court in February, 1941, we pointed out, in answer to certain specific questions from the Court:

> (1) That plaintiff secured a judgment against Indianapolis Gas for over a million dollars;

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[6] Our brief opposing certiorari opened with the following statement (Chase's brief opposing certiorari, No. 168, October Term, 1938, pp. 1-2):

> "The decree to which the City takes exception is an interlocutory decree and this Court grants *certiorari* to review such decrees only 'in extraordinary cases.' However, the question of jurisdiction urged by the City would, if well founded, present an insuperable obstacle to plaintiff's recovery and if there were any doubt as to the jurisdiction of the Federal Court, the ends of justice would best be served by determining that question *now*, before the time of the courts and the parties has been devoted to a protracted trial. Our opposition to the petition for *certiorari* is therefore confined to the proposition that the decision of the Circuit Court of Appeals sustaining jurisdiction is unquestionably correct and is in accord with the decisions of this Court and of every Circuit Court of Appeals that has passed upon the question."

(2) That under the decision of this Court in *Re Metropolitan Railway Receivership*, 208 U. S. 90, 107 (1908), jurisdiction of a federal court is not destroyed even when there is a confession of judgment by a defendant, and that there was no confession of judgment in the case at bar.

(3) That plaintiff sought an injunction against Indianapolis Gas to prevent its interfering with plaintiff's rights under the Lease.

We assumed, apparently erroneously, from the interest thereafter displayed by the Court in the merits of the controversy, that the Court's questions as to jurisdiction had been adequately answered.

When, in May, 1941, the Court set this case down for re-argument, there was no indication that the question of jurisdiction was either uppermost in the Court's mind or considered of any particular importance. Since that question must be met at the threshold of every federal case, we assumed, again erroneously, that the jurisdictional questions were satisfactorily disposed of. This opinion was apparently shared by the City's counsel, since there was only a perfunctory discussion of the jurisdictional question in the briefs filed between the two arguments.[7]

During the second oral argument only one or two members of the Court indicated that they had any doubt as to federal jurisdiction and counsel for Chase was expressly invited by the Court to turn his attention to other questions.

In spite of this situation the majority opinion of the Court denied jurisdiction and rested its conclusion upon some thirty-six cases, only three of which had at any time been called to this Court's attention by the City's counsel.

As we have pointed out in the preceding pages, the Court's decision represents such a complete departure from

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[7] See City's Supplemental Memorandum filed about September 2, 1941, p. 23; Chase's Rejoinder Brief filed October 1, 1941, p. 16; City's Reply Brief filed October 14, 1941 (no discussion of jurisdiction).

every decision of this Court and every lower federal court in determining questions of alignment and lays down a rule which is so impracticable and impossible of application that it should be adopted only after thorough and complete consideration. We recognize, of course, that lack of federal jurisdiction was one of the grounds relied upon for certiorari, but in the effort to confine our briefs to a reasonable compass, and particularly in view of the perfunctory way in which the jurisdictional question was treated by the City, we have never done more than summarize our position as to jurisdiction. In view of the far-reaching effect of the Court's decision, the complete departure from all prior decisions, and the new cases relied upon in the opinion, we submit that a more thorough consideration of the questions presented should be accorded the parties.

Fourth: The rule laid down by the Court—that in a case involving several parties and multiple issues an attempt must be made to determine the "primary and controlling matter" in dispute and that the various parties must be realigned in accordance with their attitude toward that single issue, without regard to their position as to the other issues in the case—is wholly impracticable and impossible of application.

The rule laid down by the majority opinion is not only novel and manifestly at variance with the intention of Congress, as heretofore interpreted by the courts, but is wholly impracticable and impossible of application. The fundamental unsoundness of the rule so laid down becomes apparent when an attempt is made to apply it to specific situations involving several parties and multiple issues. The direct conflict between the unanimous decision of this Court in *Ayres v. Wiswall*, 112 U. S. 187, and the majority opinion in the case at bar is a helpful illustration. It was suggested during the oral argument that the *Ayres* case is distinguishable because the transferee of the mortgaged

property admitted his liability and merely disputed the amount thereof. Such a distinction is wholly unsound. The principal and indeed the only controversy in that case was the amount due. The mortgagor, Wiswall, admitted that plaintiff's claim as to the amount due was correct. If jurisdiction must be determined in accordance with the attitude of the parties toward the principal controversy, it should have been determined in *Ayres v. Wiswall* in accordance with their attitude as to the amount due. Chief Justice Waite, however, pointed out the impossibility of realigning as a plaintiff the mortgagor against whom the plaintiff sought a personal judgment.

In personal injury cases there are generally two principal issues or controversies—first, as to liability, and, second, as to the damage sustained. Where there are several joint tort feasors the liability may be clear as to one and doubtful as to others and the extent of the liability will probably be disputed by all. If a joint tort feasor who is clearly liable admits his liability but contends that the other defendants are also liable so that he may receive contribution, must he thereupon be realigned as a plaintiff and has the issue as to the liability of the other defendants become the "principal controversy" on the basis of which the parties must be realigned?

In every suit on a contract there are multiple issues and if there are several parties to the contract different issues may be important in determining the liability of each of the different parties. There may be issues as to:

(1) whether a particular defendant was a party to the contract;

(2) the proper construction of the contract;

(3) whether there was a breach of the contract, and this may be a separate issue as to each of the defendants;

(4) the extent of the damage suffered;

(5) which defendants are responsible for each particular item of damage.

Is it possible for any district court to determine from the pleadings which of these many issues is the "actual and substantial controversy" and what the ultimate attitude of each of the parties will be as to each of those controversies, so as to determine the proper alignment of the parties? Perhaps the majority intended that this question be determined, as actually happened in the present case,[8] only from the issues which happen to remain in the case when it finally reaches the Court of last resort? Such a rule would require that the case be tried and appealed on the merits before the jurisdictional question could be tested, and would be obviously absurd.

When a creditor's bill is filed, as in *Merchants' Cotton Press Co. v. Insurance Co.*, 151 U. S. 368 (1894) complicated questions are frequently presented as to

(1) the liability of the primary debtor,

(2) the liability of the primary debtor's debtor, and

(3) as in the *Cotton Press* case, the liability of a party who agreed to indemnify the primary debtor's debtor.

How, in such a case, is the court to determine the "primary and controlling matter in dispute"? An examination of the opinion in the *Cotton Press* case shows that the Court attempted to do no such thing, but followed the well-established practice of retaining as defendants all of the parties against whom the plaintiff sought any relief.

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[8] The statement in the Court's opinion (p. 5) that Chase admits "That the case presents 'only one fundamental issue'" is warranted only on the assumption that the Court is confining its consideration of the jurisdictional question to the issues presented in the Supreme Court. Chase never admitted, and it is not the fact, that the case contained only that issue in either of the lower courts.

In these various situations and in the many other situations in which there are multiple issues and a number of parties it is not possible for any district court to determine from the pleadings which of the many issues is the "actual and substantial controversy." Moreover, the relative importance of the various issues presented frequently varies from time to time as the case progresses and in such cases it is obviously impossible for the trial court to determine the ultimate attitude of each of the parties as to each of the various controversies. In such cases is the proper alignment of the parties to be determined, as in the present case, on the basis of the issues which happen to remain in the case when it finally reaches the court of last resort?

It frequently happens that many of the issues vigorously contested in the early stages of the case are not presented to the reviewing courts, because one or more of the litigants did not appeal from the decision of the trial court or did not ask this Court for certiorari, or because those who did seek a review omitted some of the issues decided against them, or because certain issues of fact or law have become unimportant in view of the determination of other issues.

No rule for determining federal jurisdiction can be practicable unless it is susceptible of application at the threshold of the litigation, that is, by the trial court before trial, or, at the latest, when any disputed jurisdictional facts have been determined. The rule laid down in the majority opinion is not practicable because it is not susceptible of application in this way. One or two illustrations will demonstrate this fact.

In *Sutton v. English*, 246 U. S. 199 (1918), reviewed in detail in our original brief (pp. 41-2), this Court sustained jurisdiction because there was a conflict between the seven heirs who were plaintiffs and the eighth heir, Cora Spencer, as to whether the community property, if recovered, would

be divided among the eight heirs or would go to Cora Spencer alone. Now, suppose that the plaintiffs had been successful in all four of their objects in the District Court so that they had a judgment for the recovery of the $100,000 and the distribution of it among themselves and Cora Spencer, and Cora Spencer then, either through inadvertence or otherwise, failed to appeal to the Circuit Court of Appeals or to seek certiorari in this Court. Then, the only issues remaining on appeal or on certiorari would have been the first two (relating to the recovery of the community property) and the conflict between plaintiffs and Cora Spencer would have disappeared. Could the failure of one litigant to appeal in such a situation destroy the jurisdiction which had originally existed in the District Court? It must be clear that since the jurisdiction originally existed, it could not be impaired by the failure of any party to appeal.

Let us apply a similar test in the case at bar. In the District Court Indianapolis Gas denied that plaintiff was entitled to any relief against it and prayed "that as to it the Bill of Complaint be dismissed" (I R. 140). Plaintiff recovered a judgment of more than $1,000,000 (with interest at 6% after judgment) against Indianapolis Gas in the District Court and failed to recover any judgment against either of the other defendants (III R. 1193). As pointed out above (pp. 6-7), Indianapolis Gas appealed from the judgment against it and vigorously urged in the Court of Appeals that plaintiff as Trustee was not the proper party to recover a personal judgment on the unpaid coupons, that plaintiff had no right to interest on interest, that the rate of interest was in any case not more than 5% and that plaintiff could not have both a declaratory judgment and a coercive judgment. These contentions were considered in detail and disposed of by the Court of Appeals (IV R. 1301-6). If the Circuit Court of Appeals had affirmed the judgment of the District Court and refused to render any judgment against the City or Citizens Gas, and Indianapo-

lis Gas alone had petitioned for certiorari to dispute its liability, this Court would of course have held that Indianapolis Gas, the only defendant against whom plaintiff had a judgment and the only one contesting the judgment of the lower court, should not be re-aligned with plaintiff for jurisdictional purposes.

Thus the decision of this Court means that if plaintiff had been successful as to some of the objects sought and unsuccessful as to the others there would have been jurisdiction, but that since plaintiff was successful in the Circuit Court of Appeals as to all the objects which it sought there was no jurisdiction. From the City's point of view this means that there was jurisdiction if the City won and no jurisdiction if the City lost. Any such rule would deprive the parties of the mutuality of protection which is essential to the even-handed administration of justice.

Jurisdiction of the federal courts has never depended and never should depend on success or failure on the merits of the controversy or on the controversies which happened to remain in a case when it finally reached this Court. The lower federal courts could not possibly apply any such criterion as this and it would make federal jurisdiction something shadowy and shifting, appearing and disappearing as the case progresses.

We submit that the impracticability or impossibility of any court, and particularly a trial court, applying the rule which has been laid down in the case at bar for the determination of jurisdictional questions—that the supposed dominant controversy must be found and the parties all aligned in respect of their attitude, if any, toward that controversy—is a convincing explanation as to why no such rule has been adopted during the more than one hundred fifty years since the first Judiciary Act was enacted, and furnishes a strong reason why no such rule should be adopted at this time.

CONCLUSION.

Perhaps the two most important reasons for federal jurisdiction in controversies between citizens of different states are:

> *First*, the fear that a state court might not administer justice impartially in controversies between citizens of that state and citizens of foreign states,[9] and
>
> *Second*, fears arising from the methods of selecting the judiciary in the several states.[10]

These reasons apply with peculiar force in a case such as the one at bar, in which a large municipal corporation of a state is one of the principal litigants, the issues affect in some degree practically all the residents of such municipality, and such residents constitute a large proportion of the electorate who select the judges both in the trial and appellate courts.

If, as the authority cited in the majority opinion suggests,[11] the time has come to eliminate or seriously curtail federal jurisdiction based on diversity of citizenship, such jurisdiction should be eliminated or curtailed by Congress and not gradually worn away by the uncertain and irregular erosion of judicial interpretation. The right of a mortgagee, in enforcing the mortgage obligation or protecting the mortgage security, to join both the mortgagor and a transferee from the mortgagor as defendants in a federal court and to have them treated as defendants for the purpose of jurisdiction was settled by this Court in two cases decided more than fifty years ago.[12] We submit that the

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[9] See statement of Chief Justice Marshall in *Bank of United States v. Deveaux*, 5 Cranch 61, 87 (1809).

[10] *Nevins, American States* (1924), 166-7, 364; *Purcell, Connecticut in Transition* (1918), 187, 199, 200.

[11] 41 *Harv. L. Rev.* 483, 510. See also, 40 *Harv. L. Rev.* 834, 871-3.

[12] *Ayres v. Wiswall*, 112 U. S. 187 (1884); *Coney v. Winchell*, 116 U. S. 227 (1886).

majority opinion in the case at bar is a complete departure from the fundamental bases upon which these decisions were rested and the well established rules of law applied therein.

We respectfully urge that a rehearing may be granted so that this important question of federal jurisdiction may be fully considered in the light of all the authorities.

Respectfully submitted,

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Of Counsel.

Dated, December 3, 1941.

Certificate of Counsel.

We, Howard F. Burns, John Adams, and Harvey J. Elam, counsel for the above named The Chase National Bank of the City of New York, Trustee, do hereby certify that the foregoing petition for rehearing of these causes is presented in good faith and not for delay.

HOWARD F. BURNS,
JOHN ADAMS,
HARVEY J. ELAM,
Counsel for The Chase National Bank of the City of New York, Trustee.

p 2.1
pp3,4 + 5 dissent

SUPREME COURT OF THE UNITED STATES.

Nos. 10-13.—OCTOBER TERM, 1941.

City of Indianapolis, et al., Petitioners,
10 *vs.*
The Chase National Bank of the City of New York, Trustee, etc., et al.

City of Indianapolis, et al., Petitioners,
11 *vs.*
The Chase National Bank of the City of New York, Trustee, etc., et al.

The Chase National Bank of the City of New York, Trustee, etc., Petitioner,
12 *vs.*
Citizens Gas Company of Indianapolis, et al.

The Chase National Bank of the City of New York, Trustee, etc., Petitioner,
13 *vs.*
The Indianapolis Gas Company, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 10, 1941.]

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This is a suit instituted by the Chase National Bank, a New York corporation, in the federal District Court for the Southern District of Indiana, naming as defendants the Indianapolis Gas Company, the Citizens Gas Company of Indianapolis [redacted] (Indiana corporations), and the City of Indianapolis. (For brevity's sake the parties will be referred to as Chase, Indianapolis Gas, Citizens Gas, and the City, respectively.) The power of the District Court to entertain this litigation was sustained by the Circuit Court of Appeals for the Seventh Circuit under the provision of the Judicial Code conferring upon the district courts jurisdiction "Of all suits of a civil nature . . . where the matter in controversy exceeds . . . three thousand dollars, and . . . is be-

tween citizens of different States ' . . . .'' 36 Stat. 1091; 28 U. S. C. § 41(1). The correctness of this jurisdictional ruling must be determined before the merits of Chase's claims can be considered. The specific question is this: Does an alignment of the parties in relation to their real interests in the ''matter in controversy'' satisfy the settled requirements of diversity jurisdiction?

As is true of many problems in the law, the answer is to be found not in legal learning but in the realities of the record. Though variously expressed in the decisions, the governing principles are clear. To sustain diversity jurisdiction there must exist an ''actual'', *Helm* v. *Zarecor*, 222 U. S. 32, 36, ''substantial'', *Niles-Bement Pond Co.* v. *Iron Moulders Union*, [redacted] U. S. 77, 81, controversy between citizens of different states, all of whom on one side of the controversy are citizens of different states from all parties on the other side. *Strawbridge* v. *Curtiss*, 3 Cranch 267. Diversity jurisdiction cannot be conferred upon the federal courts by the parties' own determination of who are plaintiffs and who defendants. It is our duty, as it is that of the lower federal courts, to ''look beyond the pleadings and arrange the parties according to their sides in the dispute''. *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178, 180. Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary ''collision of interests'', *Dawson* v. *Columbia Trust Co.*, *supra*, at 181, exists, is therefore not to be determined by mechanical rules. It must be ascertained from the ''principal purpose of the suit'', *East Tennessee, etc., Railroad* v. *Grayson*, 119 U. S. 240, 244, and the ''primary and controlling matter in dispute'', *Merchants' Cotton Press Co.* v. *Insurance Co.*, 151 U. S. 368, 385. These familiar doctrines governing the alignment of parties for purposes of determining diversity of citizenship have consistently guided the lower federal courts[1] and this Court.[2]

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[1] *E. g.*, Pittsburgh, C. & St. L. Ry. Co. v. Balt. & Ohio R. Co., 61 Fed. 705; Cilley v. Patten, 62 Fed. 498; Board of Trustees v. Blair, 70 Fed. 414; Allen-West Commission Co. v. Brashear, 176 Fed. 119; Lindauer v. Compania Palomas, etc., 247 Fed. 428; DeGraffenreid v. Yount-Lee Oil Co., 30 F. (2d) 574.

[2] In addition to the cases cited in the text, see Removal Cases, 100 U. S. 457, 468-70; Pacific R. Co. v. Ketchum, 101 U. S. 289, 298-99; Corbin v. Van Brunt, 105 U. S. 576; Evers v. Watson, 156 U. S. 527, 532; Doctor v. Harrington, 196 U. S. 579; Wanner v. Great Northern R. Co., 209 U. S. 24; Steele v. Culver, 211 U. S. 26, 29; Lee v. Lehigh Valley Coal Co., 267 U. S. 542; Sutton v. English, 246 U. S. 199.

And so we turn to the actualities of this litigation.

Chase is the trustee under a mortgage deed to secure a bond issue executed by Indianapolis Gas in 1902. In 1906 Citizens Gas was formed to compete with Indianapolis Gas in the distribution of light, heat, and power to the people of Indianapolis. Its franchise provided that after the expiration of twenty-five years and the performance of certain specified conditions, the company should be wound up and its property conveyed to the City subject to the company's "outstanding legal obligations". The competition between the two gas companies continued until 1913, when Indianapolis Gas leased all of its gas plant property to Citizens Gas for a term of ninety-nine years. Citizens Gas agreed to pay as rental (a) the interest on the lessor's outstanding bonded indebtedness, and (b) annual sums equal to a six per cent return on Indianapolis Gas's common stock. For twenty-two years thereafter Citizens Gas operated the mortgaged property and paid the interest on the bonds. In 1935, pursuant to its franchise, Citizens Gas conveyed its entire property, including that covered by its lease from Indianapolis Gas, to the City. But the City refused to regard itself bound by this lease. On March 2, 1936, the City and Indianapolis Gas agreed that, pending the settlement of the "presently existing controversy" between them as to whether the lease was valid and binding upon the City, the latter would deposit in escrow sums equal to the interest and dividend payments falling due. The agreement expressly provided that it was made without prejudice to either party's "position or rights".

Chase thereupon filed a bill of complaint in the District Court, naming as defendants Indianapolis Gas, Citizens Gas, and the City. It prayed that the lease from Indianapolis Gas to Citizens Gas be declared valid and binding upon the defendants, and as such be deemed part of the security for the performance of the mortgage obligations; that the City be ordered to perform all of the lessee's obligations in the lease and to pay directly to the plaintiff all of the interest payments as they shall become due; that judgment for overdue interest be entered against the defendants "liable therefor"; and that the plaintiff be awarded costs and attorneys' fees. The City and Citizens Gas specifically denied that the lease was valid and binding upon them; they alleged, further, that the controversy existed solely between Indianapolis Gas and the City, "citizens" of the same state. In its answer, Indianapolis Gas denied

that it had "ever contended or admitted that the said ninety-nine year lease was not and is not a valid and binding obligation" upon the defendants.

Finding "no collision between the interests of the plaintiff and the interests of the Indianapolis Gas Company", the District Court realigned the latter as a party plaintiff, and finding identity of citizenship between some of the plaintiffs and the remaining defendants, dismissed the suit for want of jurisdiction. The Circuit Court of Appeals reversed, one judge dissenting, 96 F. (2d) 363, and certiorari was denied, 305 U. S. 600.

On remand to the District Court Chase filed a supplemental bill alleging default as to interest payments falling due and praying judgment against the defendants in the amount of the unpaid coupons. It alleged that "neither The Indianapolis Gas Company nor Citizens Gas Company, nor both of them, have property sufficient to pay their interest in default on the Bonds, other than the property now in the possession and under the control of the City of Indianapolis". This was admitted by Indianapolis Gas. The District Court held on the merits that the lease was not enforceable against either Citizens Gas or the City, that the former had no power under its franchise to bind the latter to the lease, and that by conveying the leased property to the City, Citizens Gas thereby discharged itself of its lessee obligations. Accordingly, the Court ordered that judgment be entered only against Indianapolis Gas for the amount of the unpaid interest.

Asserting that the District Court erred in not holding the lease valid and enforceable against the defendants, both Chase and Indianapolis Gas appealed. The Circuit Court of Appeals sustained their position and again reversed, 113 F. (2d) 217. The Court held, further, that Chase was entitled to a judgment for unpaid interest against the parties in the following order of liability: the City, Citizens Gas, and Indianapolis Gas. We granted certiorari, 311 U. S. 636, because of the important jurisdictional issue involved in the litigation.

The facts leave no room for doubt that on the merits only one question permeates this litigation: Is the lease whereby Indianapolis Gas in 1913 conveyed all its gas plant property to Citizens Gas valid and binding upon the City? This is the "primary and controlling matter in dispute". The rest is window-dressing designed to satisfy the requirements of diversity juris-

diction. Everything else in the case is incidental to this dominating controversy, with respect to which Indianapolis Gas and the City, "citizens" of the same state, are on opposite sides.[3] That the case presents "only one fundamental issue" and that that is the obligation of the City under the lease, Chase admits and indeed insists upon in its brief on the merits. Chase and Indianapolis Gas have always been united on this issue: both have always contended for the validity of the lease and the City's obligation under it. The opinion of the District Court lays bare the heart of this controversy:

"There can be no doubt that both plaintiff and the defendant, The Indianapolis Gas Company, have at all times asserted that the lease in question is valid and is binding upon the City, as Trustee. Neither is there any doubt as to their interest in sustaining the validity of such lease at the time of the institution of this action, prior hereto, and at all times subsequent thereto, and that many conferences have been held by and between them, through their attorneys, and many letters have passed between them relating to this subject. . . . Later, when the parties [*i. e.*, Indianapolis Gas and the City] were unable to adjust their differences and arrive at an agreement, it was decided by The Indianapolis Gas Company and the plaintiff that a suit should be instituted. The common stockholders of that company, of course, had a vital interest in the question of the validity of the lease because, if the lease is valid, they are assured of a six per cent return upon their stock for many years. If, however, a foreclosure suit should have been begun, or if the lease is invalid, no such return is assured. It was natural, therefore, that the Gas Company should take an active interest in the litigation and attempt to guide it along the course that would be most advantageous to it and to its stockholders."

Plainly, therefore, Chase and Indianapolis Gas, are, colloquially speaking, partners in litigation. The property covered by the

[3] It is contended that, notwithstanding their indissoluble bond on the controlling issue, there are "sufficient matters in controversy" between Chase and Indianapolis Gas to preclude their alignment on the same side. Chase of course did not bring this suit in order to obtain a declaration that, regardless of the validity of the lease, Indianapolis Gas is still ultimately responsible for the interest payments on its bonded indebtedness. That was not really in issue, and by its answer, Indianapolis Gas took it out of the case. The further argument is made that, by entering into the escrow agreement with the City, Indianapolis Gas has asserted a claim to the interest payments adverse to that of Chase and the bondholders. But the facts are against this contention. The agreement deals merely with the disposition of the interest falling due during the pendency of the litigation. Moreover, the lease between Indianapolis Gas and Citizens Gas contains no provisions requiring payment of the interest direct to Chase or the bondholders. Nor can diversity jurisdiction be rested upon so flimsy a basis as Chase's prayer for reimbursement of costs and attorneys' fees. The tail flies with the kite.

lease is now in the City's possession; Chase is simply acting to protect the bondholders' security. As to Indianapolis Gas, if the lease is upheld, it will continue to receive a six per cent return on its capital, and the burden of paying the interest on its bonded indebtedness will be not upon it but upon the City. What Chase wants Indianapolis Gas wants and the City does not want. Yet the City and Indianapolis Gas were made to have a common interest against Chase when, as a matter of fact, the interests of the City and of Indianapolis Gas are opposed to one another. Therefore, if regard be had to the requirements of jurisdictional integrity, Indianapolis Gas and Chase are on the same side of the controversy not only for their own purposes but also for purposes of diversity jurisdiction. But such realignment places Indiana "citizens" on both sides of the litigation and precludes assumption of jurisdiction based upon diversity of citizenship. We are thus compelled to the conclusion that the District Court was without jurisdiction.[4] And, of course, this Court by its denial of certiorari when the case was here the first time could not confer the jurisdiction which Congress has denied.

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[4] Compare Dawson *v.* Columbia Trust Co., 197 U. S. 178, a suit by a Pennsylvania mortgagee of a Georgia waterworks company to restrain a Georgia city from building a new waterworks and to compel specific performance of the city's contract with the waterworks company. The latter was joined as a defendant, on the theory that it was a party to the contract sought to be enforced. The Court held that the bill should be dismissed for lack of jurisdiction: "... the courts will look beyond the pleadings and arrange the parties according to their sides in the dispute. When that is done, it is obvious that the waterworks company is on the plaintiff's side." 197 U. S. at 180. Ayres *v.* Wiswall, 112 U. S. 187, and Coney *v.* Winchell, 116 U. S. 227, are not applicable here. They hold merely that in a foreclosure suit the mortgagee may join the mortgagor and his assignee as defendants; they did not involve any controversy between the mortgagor and the "assignee" as to whether the assignment is binding upon the latter.

Sutton *v.* English, 246 U. S. 199, clearly holds that the parties must be aligned according to their "attitude towards the actual and substantial controversy". 246 U. S. at 204. The plaintiffs, who included all of the heirs of Mary Jane except Cora, sought to establish their right to certain property claimed to have belonged to Mary Jane. The claimants could not recover unless they proved that a residuary bequest to Cora was invalid—and with respect to this issue, their position was completely adverse to Cora's. "But, as already pointed out, even could complainants succeed in showing that Mary Jane Hubbard at the time of her death was entitled to the community property, her will giving all the residue of her property to Cora D. Spencer still stands in the way of their succeeding to it as heirs-at-law, and hence their prayer to have that will annulled with respect to the residuary clause is essential to their right to any relief in the suit." 246 U. S. at 207. If the plaintiffs prevailed on this issue of the validity of the residuary gift to Cora,

This is not a sacrifice of justice to technicality. For the question here is not whether Chase and Indianapolis Gas may pursue what they conceive to be just claims against the City, but whether they may pursue them in the federal courts in Indiana rather than in its state courts. The fact that Chase prefers the adjudication of its claims by the federal court is certainly no reason why we should deny the plain facts of the controversy and yield to illusive artifices. Settled restrictions against bringing local disputes into the federal courts cannot thus be circumvented.

These requirements, however technical seeming, must be viewed in the perspective of the constitutional limitations upon the judicial power of the federal courts,[5] and of the Judiciary Acts in defining the authority of the federal courts when they sit, in effect, as state courts. See *Madisonville Traction Company* v. *Mining Company*, 196 U. S. 239, 255, and *Ex parte Schollenberger*, 96 U. S. 369, 377. The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of "business that intrinsically belongs to the state courts" in order to keep them free for their distinctive federal business. See Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483, 510; *Shamrock Oil Corp.* v. *Sheets*, 313 U. S. 100, 108-09; *Healy* v. *Ratta*, 292 U. S. 263, 270. "The policy of the statute [conferring diversity jurisdiction upon the district courts] calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution. Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy* v. *Ratta*, *supra*, at 270. In defining the boundaries of diversity jurisdiction, this Court must

their interests and hers would then be the same with respect to the remaining issues in the case. But the Court held that in relation to the "actual and substantial controversy", Cora and the plaintiffs were on opposite sides, thereby sustaining diversity jurisdiction. In Sutton v. English, alignment of the parties with respect to their real interests sustained diversity; such alignment here precludes jurisdiction. That case and this are applications of the same principle.

[5] Cf. Strawbridge v. Curtiss, 3 Cranch 267; California v. Southern Pacific Co., 157 U. S. 229, 261; Tennies v. Sunshine Mining Co., 308 U. S. 66, 71.

be mindful of this guiding Congressional policy. See *Hepburn & Dundas* v. *Ellzey*, 2 Cranch 445; *New Orleans* v. *Winter*, 1 Wheat. 91; *Morris* v. *Gilmer*, 129 U. S. 315, 328-29; *Coal Co.* v. *Blatchford*, 11 Wall. 172; *Shamrock Oil Corp.* v. *Sheets*, 313 U. S. 100; and compare *Grant* v. *M'Kee*, 1 Pet. 248; *Elgin* v. *Marshall*, 106 U. S. 578; *Healy* v. *Ratta*, 292 U. S. 263; *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

Nos. 10-13.—October Term, 1941.

City of Indianapolis, et al., Petitioners,
10 *vs.*
The Chase National Bank of the City of New York, Trustee, etc., et al.

City of Indianapolis, et al., Petitioners,
11 *vs.*
The Chase National Bank of the City of New York, Trustee, etc., et al.

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The Chase National Bank of the City of New York, Trustee, etc., Petitioner,
13 *vs.*
The Indianapolis Gas Company, et al.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 10, 1941.]

Mr. Justice Jackson.

The Chief Justice, Mr. Justice Roberts, Mr. Justice Reed and I are unable to concur in this disposition of these writs, in view of what we consider to be the controlling facts of this controversy.

Chase is trustee under a mortgage executed in 1902 by Indianapolis Gas to secure a bond issue. The mortgage covered a public utility gas plant and distribution system, together with after-acquired property, including intangibles.

In 1913 Indianapolis Gas turned the mortgaged utility system over to Citizens Gas, a competitor, under a lease for a term of ninety-nine years. Citizens Gas undertook among other things to pay the interest "as the same shall from time to time fall due"

on the bonds secured by the mortgage and also to pay certain sums, subject to some variation by reference to the price received for gas, to the stockholders of Indianapolis Gas. Citizens Gas unified this leased plant with its own, and in 1935 conveyed to the City the entire property in conformity to statute which it is contended obligates the City to assume the obligations of the lease. The City took possession of the property but refused to accept the obligations of the lease. The City and Indianapolis Gas then agreed that pending settlement of the controversy thus precipitated, sums payable under the lease as interest should be deposited in escrow, instead of being paid to Chase. Accordingly there was default in the payment to the trustee of interest on the bonds.

For jurisdictional purposes Indianapolis Gas, the mortgage debtor, and the City, whose possession of the property under the circumstances was alleged to result in an assumption of the debt, as well as Citizens Gas, the intermediate owner (who seems of no consequence to the issues under discussion), were all citizens of the State of Indiana, while Chase, the trustee, was a citizen of New York. Under these circumstances Chase began an action in the federal District Court for the Southern District of Indiana, joining Indianapolis Gas, Citizens Gas, and the City as defendants. It asked that the interest of Indianapolis Gas in the lease be adjudged a part of its security for the performance of the mortgage obligations; that the lease be declared valid and binding upon all the defendants; that the City be ordered to pay directly to the trustee all of the interest payments as they fell due; that judgment for overdue interest be entered against the defendants liable therefor, including Indianapolis Gas; and that plaintiff be awarded costs and attorneys' fees.

This Court now destroys federal jurisdiction of the case by a transposition of parties, the radical nature of which appears most clearly from the judgments rendered below. It forces into the position of co-plaintiff one party which the District Court adjudged entitled to recover over a million dollars and another which the District Court adjudged solely liable to pay that sum. This same adversity was found by the Circuit Court of Appeals, which held the one entitled to receive and the other obligated to pay this sum with increase due to the lapse of time. It modified the judgment only by including two additional judgment debtors on whom it fixed primary and secondary liability, but continued the judg-

ment against Indianapolis Gas with a tertiary liability for its satisfaction. The subtlety by which a judgment debtor is transfigured into a creditor for jurisdictional purposes deserves analysis, if for no other reason than because of its novelty.

The Court cannot resort to a decision of the merits of the case over which it holds itself to be without jurisdiction in order to justify its characterization of some of the trustee's claims as "window dressing" and "artifice." The measure of jurisdiction should be taken from the pleadings unless the claims are frivolous on their face. That is not the case here. In ultimate effect Chase alleged a cause of action and sought judgment against the City upon its personal undertaking to assume and pay the indebtedness upon the mortgage given by Indianapolis Gas to the plaintiff. It also alleged a cause of action and sought judgment against Indianapolis Gas for the amount of the coupon interest. Both demands were in excess of $3,000. If the plaintiff had asserted these demands in two separate actions, no one would doubt that both were within the jurisdiction of the District Court. In each there is an adequate diversity of citizenship and each involves the requisite jurisdictional amount and each is "actual" and "substantial" enough to support the jurisdiction, if this means anything more than that a demand for $3,000 must be involved. A United States district court is not without jurisdiction to render a judgment for $3,000 on confession if there is the requisite diversity of citizenship. *Re Metropolitan Railway Receivership*, 208 U. S. 90 at 108. The trustee's right to judgment against the mortgagor, even though uncontested, is a matter of substance, for the judgment is the important—indeed indispensable—means of pursuing the mortgaged property into the hands of the City in the event that it should turn out in the suit against the City that it had not become personally liable for any part of the mortgage debt.

Jurisdiction of the federal courts is indeed a variable and illusory thing, if the jurisdiction which a District Court admittedly has of two separate causes of action is lost when they are united in one, agreeably to the federal rules of procedure, because the one defendant as a surety seeks to enforce its equitable right to be exonerated by the other who is alleged to be the principal debtor.

The doctrine of realignment permits and requires a nominal defendant to be treated as a plaintiff for the purpose of defining the real controversy where no real cause of action is asserted against him by the plaintiff, but it does not admit of such treatment

of a defendant against whom the plaintiff asserts a cause of action within the jurisdiction of the court. The plaintiff cannot rightly be deprived of the benefit of that jurisdiction, conferred upon him by laws enacted pursuant to the Constitution of the United States, because the court may think that such a cause of action is relatively less important than that asserted against another defendant or because one action "dominates" the other or because one is more "actual" or "substantial" than the other. The statute itself sets up the criterion of substantiality by fixing the jurisdictional amount at $3,000. Moreover, in this case whether either of the rights asserted is more substantial than the other depends on the outcome of the litigation, which can hardly be used to determine jurisdiction which must exist at the beginning of the litigation.

If we examine this controversy in detail it appears that the conflicts between the trustee and its mortgagor were not feigned or merely formal. While the mortgage and the debt, which created the opposition inherent in the relation of mortgagor and mortgagee or between debtor and creditor, were undenied, Chase was asking that its lien be judicially construed to cover not merely the physical property described therein but also the entire interest of Indianapolis Gas in the lease which required payments to stockholders over and above the interest payments for the bondholders. Furthermore, Chase asked the Court to set aside the escrow agreement by which Indianapolis and the City had assumed to exclude Chase from dominion over the escrow funds. Chase demanded that Indianapolis Gas be denied future control over such funds and that they be paid directly to itself. These were conflicts as to the extent of its interest in and control over any cause of action against the City. They existed betwen Chase and the defendant Indianapolis Gas and concerned them alone.

There was also an issue as to the aggregate amount of the trustee's claim, which all defendants had a common interest in minimizing. The trustee claimed to be entitled to interest at 6% after default on coupons which bore a 5% interest rate, and it also claimed interest on overdue interest. This Court has held that where the only issue concerns the amount of the debt, as to which a mortgagor agrees with the plaintiff, but the issue is contested only by another mortgagor who has assumed the entire mortgage debt, the mortgage and the debt are the real subject matter of the controversy; that the decree when the amount is ascertained must

run against all debtors; and that the uncontesting mortgagor is a necessary party on the side opposite the mortgagee. *Ayres* v. *Wiswall*, 112 U. S. 187.

There were other issues on which the defendants were in sharp conflict between themselves. Indianapolis Gas and Chase both served their respective interests by contending against the City that its acts had the legal effect of binding it to the terms of the lease. But their common attitude in relation to this issue sprang from different legal origins. The rights of Chase had their source and their measure in the mortgage. The mortgage might or might not, depending upon the outcome of the litigation, be construed to give Chase a right to enforce for its own benefit the lease terms as against the City. Indianapolis Gas, on the other hand, derived no rights against the City from that instrument and was not, like Chase, limited by it. Indianapolis Gas's rights had no other measure than that found in the terms of the lease itself.

We would be diligent no less than the majority to prevent imposition on the jurisdiction of the federal courts by means of "window dressing" or "artifice." We find in this case nothing that warrants either characterization, and we think that the precedents invoked to support today's action reveal the gap which divides the doctrine of realignment as heretofore applied by this Court from the application made of it today.

The majority opinion leans heavily on *Dawson* v. *Columbia Trust Co.*, 197 U. S. 178. Mr. Justice Holmes in that case said: " . . . it is obvious that the water works company is on the plaintiff's side and was made a defendant solely for the purpose of reopening in the United States Court a controversy which had been decided against it in the courts of the State." And he said again: " . . . when the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed." And so say we, but there is not the slightest indication of this kind of connivance in the case before us.

In *Helm* v. *Zarecor*, 222 U. S. 32, this Court refused to align with the plaintiff a corporation although its board and officers were in entire agreement with the position of complainants on the merits of the case. Another of the cases invoked is *Niles-Bement Co.* v. *Iron Moulders Union*, 254 U. S. 77. Here a New Jersey corporation sought to break a strike by filing a bill in an Ohio District Court against labor unions, individual strikers, and an Ohio cor-

poration, all citizens of Ohio. The New Jersey plaintiff owned a controlling interest in the Ohio defendant, the two had common officers and directors, and no relief whatever was asked against the Ohio company, which the bill alleged was being delayed in delivery of goods because of the strike. The Court refused to allow such an imposition on its jurisdiction. In *Sutton* v. *English*, 246 U. S. 199, this Court held it to be error to align one of the defendants with the plaintiff for jurisdictional purposes where her interest was adverse to plaintiff on one out of four issues, although with plaintiff as to three of the four.

We take the statement in the opinion of the Court that its basis is "not in legal learning but in the realities of the record" to be another way of saying that it disagrees with the lower court's view of the facts rather than with its view of the law. Review of facts is not the conventional function of this Court, and resort to it at this stage of this litigation is somewhat less than fair to the courts below as well as to the litigants.

Three years ago this Court refused to review the decision of the Circuit Court of Appeals that this controversy was within the federal jurisdiction. *City of Indianapolis* v. *Chase National Bank*, 305 U. S. 600. Of course a denial of certiorari is not to be taken as a ruling on the merits of any question presented. However, where the case is again brought here after some years of litigation, jurisdiction ought not to be overturned on light or inconsequential grounds or on disagreements with the court below on matters of fact. To do so here is likely to result in further and, as we see it, needless delay in settling the status of an important utility and the obligations and rights of a populous municipality. We think it the duty of the Court to end this controversy by proceeding to judgment on the merits and that nothing in this record justifies ousting these parties from the federal courts. If, as the opinion intimates, the forefathers are thought to have been unwise in creating a federal jurisdiction based on diversity of citizenship, we would think the remedy of those so minded would be found in Congressional withdrawal of such jurisdiction rather than in the confusing process of judicial constriction.

We would follow the words of the jurisdictional statute when it is sought to restrict its application, quite as faithfully as when the effort is to enlarge it by recourse to doctrines which conflict with its words. Compare *Healy* v. *Ratta*, 292 U. S. 263, 270.